1979

Dan Powell et al v. Atlas Corporation et al : Brief of Respondent

Utah Supreme Court

Duane A. Frandsen; Michael A. Harrison; Attorneys for Appellants;

IN THE SUPREME COURT OF THE

DAN POWELL, REX T. POWELL, RAYON
T. POWELL, and THEORA HOLT,

Plaintiffs-Appellants,

vs.

ATLAS CORPORATION, also known as
Atlas Minerals--Division of
Corporation,

Defendant-Respondent.

RESPONDENT'S

Appeal from the
Seventh Judicial District
Honorable Maurice

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Plaintiffs-Appellants,

vs.

ATLAS CORPORATION, also known as Atlas Minerals--Division of Atlas Corporation,

Defendant-Respondent.

Case No. 16520

RESPONDENT'S BRIEF

Appeal from the Judgment of the
Seventh Judicial District Court of Emery County
Honorable Maurice Harding, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.	:	Case No. 16520
ATLAS CORPORATION,	:	
Defendant-Respondent	:	

STATEMENT OF THE NATURE OF THE CASE

This case involves conflicting unpatented lode mining claims in Emery County, Utah, in which each party seeks to quiet its title.

DISPOSITION IN THE LOWER COURT

The District Court, Judge Maurice Harding presiding, found the issues in favor of Defendant-Respondent in its Memorandum Decision, made detailed findings, and issued a decree quieting the title of Defendant-Respondent in its mining claims against Plaintiffs-Appellants.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks an affirmance of the judgment of the trial court.

STATEMENT OF THE MATERIAL FACTS

As in Appellants' Brief, the mining claims of Respondent are collectively referred to as ATLAS CLAIMS and the mining claims of Appellants are collectively referred to as POWELL CLAIMS. Respondent also uses the same designation of the various groups of ATLAS CLAIMS as do Appellants, namely GRAMLICH CLAIMS, WAREHAM CLAIMS, HIHOPE CLAIMS and TAHAWAS CLAIMS. (See page 3 of Appellants' Brief).

Respondent agrees with the facts as distinguished from the

argument) contained in the Statement of Facts on pages 2-5 of Appellants' Brief, except in the following particulars:

1. Respondent disagrees with the argument and conclusions set forth on pages 2 and 5 to the effect that the land was subject to relocation at time Appellants located their claims.

2. Respondent disagrees with the argument and conclusion on page 2 that the HIHOPE CLAIMS of Respondent are invalid.

3. There are actually 56 WAREHAM CLAIMS rather than 54 as stated on page 2. The two WAREHAM CLAIMS located in February of 1961 and shown on Exhibit 76 were omitted.

4. Exhibit 78, rather than Exhibit 68 as stated on page 3, shows the location of TAHAWAS CLAIMS.

5. The conveyances to Petro-Nuclear, Ltd., in 1967, referred to on page 3, did not include TAHAWAS CLAIMS which were located by Petro-Nuclear, Ltd., in March, 1968. (Exhibits 72 and 78).

6. The lease to Continental Oil Company referred to on page 4 was granted by Petro-Nuclear, Ltd. (then the owner of the property) on September 26, 1972, and was confirmed by Silver Bell Industries, Inc. (then the owner) on February 12, 1973. (Exhibits 57 and 72).

Respondent contends that the Statement of Facts in Appellants' Brief does not contain all the material facts. The following facts, generally set forth in chronological order, also appear from the record:

GRAMLICH CLAIMS are divided into four sub-groups, according to the date of location, with the names of the claims in each sub-group as follows:

Original Gramlich Group located in August, 1945 as set forth in Exhibit 56)

Wedding Bell, San Rafael, Desert Moon, Desert Moon 1, Desert Moon 2, Desert Moon 3, Soup Thiessen, Don, Chester, Katy, August, Philip Fredrick, Peggy, Johnny Boy, Atomic Bomb, Betty A, Desert Rat, Hirohito's Downfall, Honey Moon, Little Mike, Marjory Ann, and Reefer.

1950 Gramlich Group (Located in April and May, 1950, as set forth in Exhibit 56)

Desert Moon 4, Desert Moon 5, Desert Moon 6, Johnny Boy 1, and Vanura.

1951 Gramlich Group (Located in March, 1951 as set forth in Exhibits 31 and 32)

Katy 1, Katy 2, August 1, August 2, Johnny Boy 2, Johnny Boy 3, Johnny Boy 4, Vanura 1, Vanura 2, and Vanura 3.

1953 Gramlich Group (Located in May, 1953 as set forth in Exhibit 55)

Vanura 4, Vanura 5, Vanura 6, Vanura 7 and Vanura 8.

Because repeated reference is made to various maps in the record, an explanation of some of those maps is helpful.

The Trial Court found that Exhibits 41, 42 and 43 "accurately portray the location on the ground and dimensions" of ATLAS CLAIMS. (Memorandum Decision dated February 22, 1978; Finding of Fact No. 16 in Findings of Fact and Conclusions of Law dated May 18, 1979). These exhibits, on a scale of 1 inch equals 200 feet, were prepared by Charles Howard Skipper, Sr., from a survey made by his firm, Skipper Resources, Incorporated, between October, 1977 and the trial of this case. (Transcript of March 21, 1978, Pages 63-74). Charles Howard Skipper, Sr., and Skipper Resources, Incorporated, are hereinafter sometimes referred to as SKIPPER. ATLAS CLAIMS, as shown on Exhibit 41 (covering claims in Southwest

area), Exhibit 42 (covering claims in North area), and Exhibit 43 (covering claims in Southeast area) are shown on Exhibit 47, a composite map prepared by SKIPPER on a scale of 1 inch equals 600 feet. (Transcript of March 21, 1978, pages 66-67). Exhibit 32 is a map, prepared by SKIPPER, of some of GRAMLICH CLAIMS as shown on Exhibit 47. (Transcript of March 21, 1978, page 75). Exhibits 48, 49 and 50 are transparencies showing POWELL CLAIMS on the same scale as Exhibit 47, which overlay Exhibit 47 and better demonstrate the conflict between ATLAS CLAIMS and POWELL CLAIMS than will Exhibits 1 and 3. (Transcript of March 21, 1978, pages 76-78). Exhibit 71 is a map which shows some of the mine workings (which are identified by number) and drilling on ATLAS CLAIMS with reference to the claim boundaries (which are shown essentially as they are on Exhibits 41, 42, 43 and 47) and to which reference was made by several of the witnesses as hereinafter set forth.

In March, 1951, J. W. Gramlich, the locator of GRAMLICH CLAIMS and Otho Murphy, while surveying Original Gramlich Group and 1950 Gramlich Group, found some of the original monuments, rebuilt those which had been destroyed or could not be found, and posted and recorded amended notices of location. (Exhibit 56; Transcript of March 21, 1978, pages 4, 5, 9, 10, 13, 22; Exhibit 31). At the same time, they located 1951 Gramlich Group. (Transcript of March 21, 1978, pages 5-6, 16, 18, 24, 25; Exhibit 31). In describing this work, Mr. Murphy recognized Exhibit 32 as a map of GRAMLICH CLAIMS. (Transcript of March 21, 1978, pages 7, 15). The amended notices on Original Gramlich Group and 1950 Gramlich Group and the original notices on 1951 Gramlich Group, prepared by Mr. Gramlich and Mr. Murphy, in addition to

describing the claims with reference to a section corner, show the relationship of each claim in the group to another claim or claims. (Exhibit 31).

Samuel R. McDougall, in 1949, in 1952, and from November, 1953 until July 1957, worked and mined GRAMLICH CLAIMS, which work and mining he described in detail with reference to particular claims and which he recognized as being located as shown on Exhibits 47 and 71. (Transcript of April 26, 1978, pages 8-26).

Phil Gramlich and his brother, John Gramlich, drilled and mined, in 1952, on particular GRAMLICH CLAIMS as shown on Exhibit 71. (Transcript of April 26, 1978, pages 34-44).

In 1953, Melvin Carlson, a mining engineer, made a thorough inspection, using a map, of Original Gramlich Group, 1950 Gramlich Group and 1951 Gramlich Group. (Transcript of March 21, 1978, pages 120-123). He "verified that a goodly portion of the monuments were there" and that "most of the monuments were stone, with a large, long stone in the center surrounded by other stones." (Transcript of March 21, 1978, page 123).

In May, 1953, J. W. Gramlich, with the assistance of Mr. Carlson, located 1953 Gramlich Group so that the West line of Vanura 4, 5, 6 and 7, on the ground, was common with the East line of the earlier Vanura, Vanura 1, Vanura 2 and Vanura 3. (Transcript of March 21, 1978, pages 124, 125, 127-129; Exhibit 47; Exhibit 55). In 1954, Mr. Carlson moved the corners on the East line of Vanura 6 and 7 (which includes the Southeast corner of Vanura 5) East up to 50 feet so they were exactly 1,200 feet East of Original Gramlich Group (Betty A, et al.) from which Mr. Carlson began his survey in locating 1953 Gramlich Group, and posted and recorded amended notices correcting the bearing in the

description of those claims. (Transcript of March 21, 1978, pages 126-129; Exhibit 55). Mr. Carlson observed that the monuments on all GRAMLICH CLAIMS were in place up to the time he stopped working on the property in April, 1955. (Transcript of March 21, 1978, pages 126, 127).

Frank Hovis, who worked on GRAMLICH CLAIMS from April or May, 1954 to January, 1964, for Four Corners Uranium Corporation, whose name was later changed to Four Corners Oil & Minerals Company (hereinafter referred to as FOUR CORNERS), described extensive drilling and mining operations on particular claims and the existence of the monuments, making reference to Exhibits 47 and 71 and Exhibits 94, 95 and 96; the latter three exhibits being sectionalized maps of GRAMLICH CLAIMS showing, on a larger scale, mine workings and drill hole locations as on Exhibit 71. (Transcript of March 22, 1978, pages 53, 54, 67-77; Transcript of April 26, 1978, pages 45-74). In 1954 and in 1956 or 1957, the monuments were all in place and were readily identifiable because they were "Gramlich monuments," which were "either a triangular rock or a rectangular rock up in the center of another pile of rocks." (Transcript of March 22, 1978, pages 70-72; Transcript of April 26, 1978, pages 50,51).

Roger Head, a surveyor employed by FOUR CORNERS on GRAMLICH CLAIMS from the fall of 1960 through 1962, observed the monuments and reestablished any that were knocked down at that time, was acquainted with the various mines by the designated numbers, and recognized at the trial the claims as shown on Exhibit 47. (Transcript of March 22, 1978, pages 52-60. See Exhibits 71, 94-96). In February, 1961, Mr. Head located HIHOPE CLAIMS which were surveyed and described with reference to GRAMLICH CLAIMS.

(Transcript of March 22, 1978, pages 55-58, 62-64; Exhibit 69).

James A. Vaughn, an employee of Respondent, then the lessee from Petro-Nuclear, Ltd. (hereinafter referred to as PETRO-NUCLEAR), then the owner, described drilling and mining on particular claims and mines on ATLAS CLAIMS as shown on Exhibit 71, between September 1, 1967 and September 1, 1968. (Transcript of March 22 pages 90-95; Transcript of March 23, 1978, pages 16, 19, 20; Exhibits 70 and 72). The lease of Respondent was terminated on October 2, 1968. (Exhibit 90).

In 1968 and 1969, Orville W. Brammier surveyed GRAMLICH CLAIMS and WAREHAM CLAIMS for PETRO-NUCLEAR, which work he described with reference to Exhibit 47. (Transcript of March 23, 1978, pages 2-5, 10, 11, 13, 14). He found the existing monuments, constructed new green steel monuments, and located, for PETRO-NUCLEAR, TAHAWAS CLAIMS to fill small gaps between certain GRAMLICH CLAIMS and which TAHAWAS CLAIMS were described with reference to GRAMLICH CLAIMS. (Transcript of March 23, 1978, pages 3-15; Exhibit 78).

In July, 1972, Dwight Crossland, a mining engineer, inspected ATLAS CLAIMS, found the green corners erected by Mr. Brammier and used them, with a map, to locate the various mines. (Transcript of March 22, 1978, pages 100-102).

In February and March, 1973, Continental Oil Company (hereinafter referred to as CONOCO), the lessee under PETRO-NUCLEAR, drilled 22 holes on ATLAS CLAIMS, having an average depth of 900 feet, a total depth of 19,260 feet and a total cost of $32,609.42. (Exhibit 57; Transcript of March 21, 1978, pages 142-144; Transcript of March 22, 1978, pages 2-8, 16, 44, 46-51; Exhibits 59-64). In October and November, 1973, CONOCO drilled 59 holes

on ATLAS CLAIMS, having an average depth of about 450 feet, a total depth of 25,923 feet, and a total cost of $34,223.00. (Transcript of March 22, 1978, pages 16-29, 25-27, 31-42; Exhibits 65-67). The location of this drilling is shown on Exhibit 58, which includes an outline of ATLAS CLAIMS, with the holes drilled in February and March marked in green and the holes drilled in October and November marked in red. (Transcript of March 22, 1978, pages 2, 6-9, 16, 22, 27-32, 39, 40). Ray Kozusko, CONOCO's project geologist, testified that the drilling by CONOCO contributed to a geologic evaluation of the "entire claim block" (ATLAS CLAIMS). (Transcript of March 22, 1978, pages 28-32, 37, 38. See pages 43, 44 of this Brief).

From January through May, 1974, Appellants located 45 claims named as follows: Marion 7-10, Gamma 9-12, Alpha 1, Alpha R, Alpha U, Mac 5-10, Apex 1, Ace 1-10, Yellow Sands 0, Yellow Sands 1-12, and Ridge 1-4, which conflict with the following ATLAS CLAIMS (33 in number), to-wit: Wedding Bell, San Rafael, Tahawas 3, Betty A, Little Mike, Soup Theissen, Don, Desert Moon 2 and 4, Chester, Katy, Katy 1 and 2, Philip Fredrick, August, August 1 and 2, Peggy, Johnny Boy, Johnny Boy 1-4, Ajax 22, and Hihope 1-9. (Exhibits 1, 3, 5-16, 47, 48 and 50).

CONOCO released its lease in January, 1975, but in December, 1974, Respondent, while investigating ATLAS CLAIMS, did 3,295 feet of drilling on Vanura 4, Vanura 5 and Vanura 8 claims at a cost of $5,766.25. (Exhibit 91; Transcript of March 22, 1978, pages 83-85; 102-103; Transcript of March 23, 1978, pages 38-47, 51; Exhibits 74 and 80).

All the drilling done by CONOCO and Respondent penetrated the ore bearing formation and the results were properly evaluated.

(Transcript of March 22, 1978, pages 5, 6, 11, 12, 16-20, 26, 27, 30-38, 40-42; Transcript of March 23, 1978, pages 40-45, 47-51; Exhibit 68).

In January, June and July, 1975, Appellants located 13 claims named as follows: Yellow Sands A, B, C, D, E, and F, Mac 1-4, Bridge 3 and 4, Bridge Fraction, which conflict with the following ATLAS CLAIMS (17 in number), to-wit: Little Mike, Don, Johnny Boy 2 and 3, Hihope 1 and 6-8, Soup Thiessen, Desert Moon 1-6, and Ajax 22 and 23. (Exhibits 1, 2, 3, 16-19, 47-50).

On March 3, 1975, Respondent acquired ownership of ATLAS CLAIMS, and between that date and September 1, 1975, mined at a cost of $14.00 per ton, 1,905 tons of material, making a total reasonable cost of $26,670.00, from the area of Mine No. 9 (Vanura 2, 3, 6 and 7), Mine No. 11 (Katy 1 and Johnny Boy 1), and Mine No. 2 (Vanura 4 and 8), in addition to ore mined and shipped from the Wedding Bell claim. (Transcript of March 22, 1978, pages 83-85, 104, 105; Transcript of March 23, 1978, pages 23-30, 35, 36, 57, 58, 62, 65; Exhibits 71, 72 and 74).

Affidavits were recorded with reference to the above described work by CONOCO and Respondent for the assessment years ending September 1 in 1973, 1974 and 1975. (Exhibit 77). Albert E. Dearth, the President of Atlas Minerals, a division of Respondent, and a qualified geologist familiar with the area, testified that the drilling and mining done by CONOCO and Respondent benefitted and contributed to the development and extraction of uranium ores from the entire group of ATLAS CLAIMS, that there "is ore and mineralization all over the area," that there are trends, traces, patterns and streaks that lead from one ore body to another and that even the information provided by a barren hole is valuable.

(Transcript of March 23, 1978, pages 67-73, 80, 85. See also Transcript of April 26, 1978, pages 76, 77; this Brief, pages 44-46).

The Trial Court found that for each of the critical periods the required assessment work was done and that the work benefitted each of ATLAS CLAIMS. (Findings of Fact Nos. 17, 18 and 19 in Findings of Fact and Conclusions of Law dated May 18, 1979.)

On September 1, 1975, Appellants located Yellow Sands 13 which conflicts with the following ATLAS CLAIMS, to-wit: Hihope 7 and 8. (Exhibits 20, 47 and 48).

In the summer of 1977, William Francis Price, acting for Respondent, surveyed some of the lines of ATLAS CLAIMS as indicated on Exhibit 41, found all of the monuments or evidence thereof along the entire line, with the exception of two or three points, and constructed new two by two monuments. (Transcript of March 21, 1978, pages 131-140).

Exhibits 41, 42 and 43 show where monuments were found by SKIPPER, some of which were described as "a sharp rock protruding out of the center" or as a "stone turned on in (end) sitting...in rocks around them" (See earlier reference in this Brief on pages 5 and 6 to "Gramlich monuments"). (Transcript of March 21, 1978, pages 63, 65, 67, 72, 74-75, 113, 114). SKIPPER found evidence of earlier surveys and some of the green steel posts. (Transcript of March 21, 1978, pages 67, 85, 86, 114).

ARGUMENT

ANSWER TO APPELLANTS' POINT I--THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT GRAMLICH CLAIMS ARE NOT INVALID BECAUSE OF ALLEGED DISCREPANCIES BETWEEN THEIR LOCATION ON THE GROUND AND THE DESCRIPTIONS IN THE AMENDED AND ORIGINAL NOTICES OF LOCATION MADE IN 1951 AND IN FINDING THAT ATLAS CLAIMS ARE LOCATED AND THEIR DIMENSIONS ON THE GROUND ARE AS SHOWN ON EXHIBITS 41, 42 AND 43.

Appellants' Argument I can be separated into two contentions: First, that the land covered by some of GRAMLICH CLAIMS does not conform to the descriptions contained in the amended and original notices made in 1951, thereby invalidating the claims; and second, that those same GRAMLICH CLAIMS have been "shifted", "walked" or moved from their place of original location so that the Respondent cannot claim the land presently covered.

The statute which governs is 30 U.S.C.A., § 28, the pertinent part of which reads as follows:

> ....All records of mining claims...shall contain...such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim....

Respondent concedes that some of the amended notices on Original Gramlich Group and 1950 Gramlich Group and the original notices on 1951 Gramlich Group are not perfectly accurate in describing the location of the claim with reference to the section corner mentioned in the notices. The discrepancy lies in the general bearing of the group of claims. The claims are described as running North, when their actual bearing on the ground is about North 17° East; so that while there is little discrepancy on the South portion of the claims (where the major conflict area is), as the distance increases from the original tie-in point the variance increases. (See Exhibits 41, 42, 43 and 87).

The notices, which are contained in Exhibit 31, describe each claim with reference to other claims in the group so that if one claim is found either on the ground or in the records it would not be difficult to find the balance of the claims because of their stated relationship to each other.

While Appellants do not cite any, there are many cases on

the issue of the sufficiency of the description with reference to a natural object or permanent monument which show that considerable latitude is allowed and that strict, technical compliance is not required; that a reference to another mining claim is sufficient; that a description is sufficient if, under all the facts and circumstances, it fixes the general locality of the claim; that a variation between the boundaries of a claim as marked on the ground, and the description in the notice, will not, by itself, invalidate the claim; and that the sufficiency of the description is a question of fact. Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713 (1882); Upton v. Larkin, 7 Mont. 449, 17 Pac. 728 (1888); Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654 (1889); Hanson v. Fletcher, 10 Utah 266, 37 Pac. 480 (1894); Riste v. Morton, 20 Mont. 139, 49 Pac. 656 (1897); Wilson v. Triumph Consolidated Mining Co., 19 Utah 66, 56 Pac. 301 (1899); Farmington Gold Mining Co. v. Rhymney Gold & Copper Co., 20 Utah 363, 58 Pac. 832 (1899); Wells v. Davis, 22 Utah 322, 62 Pac. 3 (1900); Bonanza Consolidated Mining Co. v. Golden Head Mining Co., 29 Utah 159, 80 Pac. 736 (1905); Londonderry Mining Company v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455 (1907); Ninemire v. Nelson, 140 Wash. 511, 249 Pac. 990 (1926); Cranford v. Gibbs, 123 Utah 447, 260 P.2d 870 (1953); Fuller v. Mountain Sculpture, 6 Utah 2d 385, 314 P.2d 842 (1957). See also 58 C.J.S., Mines and Minerals, 1948, § 52, page 106; 2 Lindley on Mines, Third Edition, 1914, § 382, beginning at page 904; Upton v. Santa Rita Mining Co., 14 N.M. 96, 89 Pac. 275 (1907).

Cranford v. Gibbs, supra, a Utah case, sustains the finding of the lower court that the claims were valid, even though actually located in an area distant from that referred to in the

notices of location.

Fuller v. Mountain Sculpture, supra, another Utah case, is directly in point. The claim was described in the notice of location as running "due north-south" but was actually "25 degrees west of north...so that if the description were applied literally it would not include" the area "in controversy." This Court found no basis to disturb the finding of the trial court that the claim was where the monuments were and held that the variance did not invalidate the claim.

In the case at hand, the Trial Court found that valid and proper notices of location were posted and recorded which includes, by implication, a finding that the descriptions were sufficient. (See Finding of Fact No. 12 in the Findings of Fact and Conclusions of Law dated May 18, 1979).

"The rule of review of issues of fact is that all of the evidence and every inference and intendment fairly arising therefrom should be taken in the light most favorable to the findings made by the trial court." Rummell v. Bailey, 7 Utah 2d 137, 320 P.2d 653 (1958), citing Jensen v. Logan City, 96 Utah 53, 83 P.2d 311 (1938) and Toomer's Estate v. Union Pac. R. Co., 121 Utah 37, 239 P.2d 163 (1951).

Applying the above rule, the evidence does sustain the finding of the Trial Court that the amended notices and original notices made on GRAMLICH CLAIMS in 1951 were sufficient.

Appellants can hardly complain about technical defects in the descriptions in the notices for GRAMLICH CLAIMS when the descriptions in the notices on POWELL CLAIMS are such that Appellants' surveyor testified that the same could not be plotted at all from the notices. (Transcript of March 23, 1978, page 139.)

The primary thrust of Appellants' Argument I is that some of GRAMLICH CLAIMS have been moved. Finding of Fact No. 16, that Exhibits 41, 42 and 43 accurately show the location of ATLAS CLAIMS, includes a rejection by the Trial Court of this contention, and is a finding that the claims have not been moved.

The sole grounds asserted by Appellants to support their argument is that a platting of some of the amended and original notices of location made by J. W. Gramlich and Otho Murphy in 1951 does not cover exactly the same ground as that shown in Exhibits 41, 42 and 43.

In case of a variation as to the location of a claim between the monuments on the ground and the description in the notices, the monuments control. 58 C.J.S., Mines and Minerals, 1948, § 52, page 106; American Mining Law, 1943, Volume I, Bulletin 123, § 536, page 317; 2 Lindley on Mines, Third Edition, 1914, § 382, pages 904-905. This is the holding of this Court in Fuller v. Mountain Sculpture, supra.

The facts in the Statement of Material Facts show that GRAMLICH CLAIMS actually existed on the ground from the time of location as they are now shown on Exhibits 41, 42 and 43. Evidence (which is only briefly referred to in the Statement of Material Facts but is more completely indicated in the entire record) of recognition of the claims and extensive drilling and mining operations from the earliest days at established mines (which could not be moved) on particular claims, all as shown on Exhibits 47 and 71; continuity in the maintenance of the monuments at their present location; the continued existence of some of the "Gramlich monuments"; and the location of the 1952 Gramlich Group (which was accurately described in the amended notices) adjoining

the earlier GRAMLICH CLAIMS on the ground; all support the finding of the Lower Court. (See this Brief, pages 2-10).

Appellants' contention was made by appellants in Cranford v. Gibbs, supra. The Yellow Canary claims of respondents were described in the notices as being two miles Northeast of Marysvale, Utah "along Old County Highway." Appellants contended that the claims were originally located in an area designated by the Court for convenience as Area 1, miles from the subsequent surveyed location, known as Area 2. Area 1 was considerably closer to the Old County Highway (referred to in the notices of location) than Area 2.

After summarizing the conflicting testimony, the Utah Supreme Court said:

> We have generalized the principal testimony only to point out that a finding as to the original location of the Yellow Canary claims is dependent upon the credibility of the witnesses. The trial court, having heard and observed the witnesses and after visiting the actual lands involved, resolved the issues in favor of the respondents and against the appellants. We are not inclined to disturb his findings.

The same can be said here, and under the rule of review in Rummell v. Bailey, supra, there is clearly evidence to support the finding of the Trial Court that GRAMLICH CLAIMS have not been "shifted", "walked" or otherwise moved.

ANSWER TO APPELLANTS' POINT II--THE TRIAL COURT DID NOT ERR IN FINDING THAT DESERT RAT CLAIMS AND SAND VALLEY CLAIMS WERE NOT VALIDLY LOCATED AND THAT IF IT IS ASSUMED THAT SAID CLAIMS WERE VALIDLY LOCATED, THE ASSESSMENT WORK HAD NOT BEEN DONE AND THE LANDS WERE OPEN TO LOCATION WHEN HIHOPE CLAIMS OF RESPONDENT WERE LOCATED.

Appellants assert that the land covered by HIHOPE CLAIMS (located in February, 1961) was validly appropriated by prior Desert Rat 2 and 3 (hereinafter referred to as DESERT RAT CLAIMS)

and Sand Valley and Sand Valley 1-6 (hereinafter referred to as SAND VALLEY CLAIMS) and was not open to location in February, 1961.

In analyzing the evidence regarding DESERT RAT CLAIMS and SAND VALLEY CLAIMS it should be remembered that Appellants do not claim under those alleged locations, but rather assert them in an effort to defeat HIHOPE CLAIMS of Respondent which were located many years prior to POWELL CLAIMS. From Columbia Standard Corp. v. Ranchers Exploration and Development, Inc., 10th Cir., 468 F.2d 547 (1972), citing Ranchers Exploration & Development Co. v. Anaconda Co., D. Ut., 248 F. Supp. 708 (1965), we read the followi

> There is an absence of good faith where the junior locator seeks possession solely on the basis of defects in the senior locator's claims.

The Trial Court found that the boundaries of DESERT RAT CLAIMS and SAND VALLEY CLAIMS were not distinctly marked on the ground so the same can be readily traced and that discovery monuments were not erected and notices of location posted thereon for DESERT RAT CLAIMS and SAND VALLEY CLAIMS other than Desert Rat 3, Sand Valley, and Sand Valley 2 and 5. (Finding of Fact No. 5 in Findings of Fact and Conclusions of Law dated May 18, 1979. See 30 U.S.C.A. § 28; § 40-1-3, Utah Code Annotated, 1953).

While it is true that Roger Fluckey testified that he erected corner monuments and a discovery monument at which a notice was placed on Desert Rat 3 and that he followed "the same procedure in staking Desert Rat 2," Appellants' Surveyor knew nothing of this claim and no map of Desert Rat 2 prepared by a surveyor was offered by Appellants at the trial. (Transcript of March 23, pages 92, 93, 117, 118). The only evidence as to the

location of Desert Rat 2 was a free hand drawing of its "approximate" location by Mr. Fluckey on Exhibit 85. (Transcript of March 23, 1979, pages 104-106, 109, 110).

Appellants attempt to remedy this uncertainty by making reference to an amended notice of location. (Appellants' Brief, pages 11, 12; Exhibit 82). SKIPPER prepared Exhibit 99 which overlays Exhibit 47 showing, among other things, Desert Rat 2 as shown on Exhibit 85, and Exhibit 100 which is also an overlay on Exhibit 47 showing Desert Rat 2 from the description in the amended notice. (Transcript of April 26, 1978, pages 79-86.) These exhibits show that the amended notice describes the claim in a different place than where Mr. Fluckey drew it.

With reference to SAND VALLEY CLAIMS, the only evidence of the erection of the monuments marking the boundaries and their actual location on the ground is the testimony of Mr. Fluckey that when locating DESERT RAT CLAIMS he was familiar with the boundaries of SAND VALLEY CLAIMS. (Transcript of March 23, 1978, page 90). Mr. Fluckey did not point out the location of the SAND VALLEY CLAIMS monuments to Appellants' surveyors, who admitted that they found no corner monuments and that the positions of SAND VALLEY CLAIMS on Exhibit 85 were "pieced together" from the discovery monuments found for Sand Valley, Sand Valley 2 and Sand Valley 5, using the amended notices of location in Exhibit 86. (Transcript of March 23, 1978, pages 104, 112-122; Transcript of April 26, 1978, pages 90-95). The uncertainty of this approach in determining the position of SAND VALLEY CLAIMS is illustrated by the fact that a platting of SAND VALLEY CLAIMS from the amended notices (with discovery monuments where the descriptions say they are), as with Desert Rat 2, puts them in a quite different location

than does Exhibit 85. (Exhibits 47, 99 and 100; Transcript of April 26, 1978, pages 79-86).

The only evidence of the erection of discovery monuments on SAND VALLEY CLAIMS is the testimony of Arther Duane Wise, one of Appellant's surveyors, that he and his crew found the discovery monument of Sand Valley with an amended notice of location in it and the discovery monuments of Sand Valley 2 and Sand Valley 5 with papers in them. (Transcript of March 23, 1978, pages 112-119; Transcript of April 26, 1978, pages 90-91, 94-95. See § 40-1-2, Utah Code Annotated, 1953).

The actual language in Dagget v. Yreka Min. & Mil. Co., 149 Cal. 357, 86 Pac. 968 (1906), cited on page 14 of Appellants' Brief, is as follows:

> The only competent evidence of the marking of boundaries is that of witnesses who saw the monuments placed, or who saw them standing after being placed.

and is not inconsistent with, but rather supports the position of Respondent.

Respondent submits that the burden was on Appellants to show, not only that the proper acts of location were accomplished on DESERT RAT CLAIMS and SAND VALLEY CLAIMS, but also where the claims were actually located on the ground with sufficient accuracy that the boundaries can be determined without speculation. Appellants did not sustain that burden.

The Trial Court found that the discovery monument for Desert Rat 3 was located on Desert Moon 1, a prior valid claim which is part of ATLAS CLAIMS, and that the discovery monument of Sand Valley 6, if any, was located on Desert Moon 5, a prior valid claim which is part of ATLAS CLAIMS. (Findings of Fact Nos. 7

and 8 in Findings of Fact and Conclusions of Law dated May 18, 1979).

A mining claim having its discovery monument on a prior valid claim is void. Watson v. Mayberry, 15 Utah 265, 49 Pac. 479 (1897); Reynolds v. Pascoe, 24 Utah 219, 66 Pac. 1065 (1901); Lockhart v. Farrell, 31 Utah 155, 86 Pac. 1077 (1906). See also Fox v. Myers, 29 Nev. 169, 86 Pac. 793 (1906); Cram v. Church, 9 Utah 2d 169, 340 P.2d 1116 (1959).

The evidence (which is not challenged by Appellants) shows that Desert Moon 1 and 5 were located prior to Desert Rat 3 and Sand Valley 6 and that the assessment work was done on Desert Moon 1 and 5 for the assessment years pertinent to the dates of the alleged location and amended location of Desert Rat 3 and Sand Valley 6. (See Exhibits 56, 71, 81-82, 86, 88 and 92-97; Transcript of April 26, 1978, pages 9, 11-23, 27, 28, 33-41, 45-75).

Appellants do not attack the finding of the Trial Court that the discovery monument of Sand Valley 6 was on Desert Moon 5, but do contend that the evidence does not show that the discovery monument of Desert Rat 3 is on Desert Moon 1. (Appellant's Brief, page 11).

The evidence sustains the finding of the Lower Court in both instances. Exhibit 85 was identified and offered by Appellants. (Transcript of March 23, 1978, pages 117, 118). It is a copy of Exhibit 1 (also Appellants' Exhibit) insofar as it shows the location of ATLAS CLAIMS and POWELL CLAIMS. It shows the boundaries of Desert Moon 1 and 5. Roger Fluckey (called by Appellants) testified as set forth on pages 103, 107 and 108 of the Transcript of March 23, 1979 as follows:

Q (By Mr. Frandsen) Will you come forward here and examine Plaintiffs' Exhibit 85, and will you stand over here and point out where this Desert Rat 3 is?

A Desert Rat 3, right here.

(Witness indicating.)

Q Now, are you still pointing there to a claim that is labeled Desert Rat 3 and is circled in purple and is hatched with red lines?

A Yes.

Q All right now, where does that fit in in relation to the Atlas claims?

A These are the Atlas claims on the west.

(Witness indicating.)

....

Q Mr. Fluckey, with reference to Desert Rat 3, where is the discovery monument?

A To the north end.

Q Would you come and indicate it on the map? Let's see, what color did we use? Green. Let's have the green. Would you point out the discovery monument on Desert Rat 3, and would you writ (sic) the words D.M. for discovery monument?

A (Witness complied.)

An examination of Exhibit 85 shows the green "D.M." to be well within the boundaries of Desert Moon 1. This is further demonstrated by overlaying Exhibit 99 (the transparency showing DESERT RAT CLAIMS and SAND VALLEY CLAIMS) on Exhibit 47. (See Transcript of April 26, 1978, pages 79-86).

Even though Appellants do not question the finding with reference to Sand Valley 6 and even though there is no evidence of the erection or existence of the discovery monument on that claim, if it were there it would be on Desert Moon 5 as shown by overlaying Exhibit 99 on Exhibit 47.

The Trial Court found that the assessment work was not done on DESERT RAT CLAIMS and SAND VALLEY CLAIMS for the assessment year ending September 1, 1960 and the period between September 1, 1960 and the 20th day of February, 1961, when Hihope 9, the last of HIHOPE CLAIMS was located. (Finding of Fact No. 9 in Findings of Fact and Conclusions of Law dated May 18, 1979). Appellants do not challenge the finding with reference to the latter period.

Appellants' offered proof of assessment work done on DESERT RAT CLAIMS for the assessment year ending September 1, 1960 in the form of testimony of Roger Fluckey, the locator, on direct examination, that one hole was drilled on Desert Rat 2 and one hole on Desert Rat 3, that he guessed each hole was between 80 to 100 feet deep and that he remembered that the average cost of drilling was $0.85 to $1.25 a foot. (Transcript of March 23, 1978, pages 98, 99). On cross examination he said that he couldn't remember but the depth was around 80 feet. (Transcript of March 23, 1978, page 110.) On redirect the witness said he was "making a wild guess" on direct and cross, that he was guessing and did not know exactly, and that 80 feet would be the minimum and 150 feet the maximum depth of each hole. (Transcript of March 23, 1978, pages 110-111.)

No other assessment work was claimed as is evidenced by the fact that an Affidavit of Labor and Improvement was executed and recorded by Mr. Fluckey for five claims (including DESERT RAT CLAIMS) and the two drill holes described above were the entire assessment work claimed for the claims listed in the affidavit. (Exhibit 84; Transcript of March 23, 1978, page 110).

Respondent does not quarrel with the general rule on burden of proof in Hammer v. Garfield, 130 U.S. 291, 32 L.Ed. 964 (1889)

and McCulloch v. Murphy, Cir.Ct., D.Nev., 125 Fed. 147 (1903), cited on page 13 of Appellants' Brief with reference to the alleged assessment work on DESERT RAT CLAIMS, as applied to those cases which involved a contest (unlike the particular issue involved here) between prior and subsequent conflicting locators in which the latter claimed the former had not done the required work. Appellants also correctly cite the statutory requirement in 30 U.S.C.A. § 28 on page 12 of their brief that $100.00 worth of labor is required for each claim during annual assessment periods now ending on September 1. However, the proof that work having the required value was not done on DESERT RAT CLAIMS is clear and convincing. If the minimum figures given by Mr. Fluckey (80 feet per hole and a price of $0.85 per foot) are accepted, there is only $68.00 "worth of labor" for each claim.

There are two principles which defeat Appellants' contention regarding the assessment work on DESERT RAT CLAIMS that the median of the figures on the depth of the holes and price per foot should be used. (See page 13 of Appellants' Brief). First is the holding of Alvarado v. Tucker, 2 Utah 2d 16, 268 P.2d 986 (1954), that testimony on cross examination that defendant was going anywhere from 25 to 30 miles per hour is not evidence that defendant was traveling faster than 25 miles per hour. Applying this rule, the testimony of Mr. Fluckey is only evidence that $68.00 worth of labor was performed on each of DESERT RAT CLAIMS. Second is the rule of review in Rummell v. Bailey, supra. Viewing the testimony of Mr. Fluckey in the light most favorable to the finding of the Trial Court only the minimum depth and value can be considered.

Appellants attempted to prove that assessment work in the

form of drilling was done on SAND VALLEY CLAIMS for the assessment year ending September 1, 1960 with the testimony of Mr. Warren Thurston. (Appellants' Brief, page 15). Appellants, in their Brief, do not claim any mining as assessment work and, at the trial, did not offer any proof in that regard.

The following from the Transcript of April 26, 1978, establishes that Mr. Thurston's testimony is ineffective in showing that sufficient drilling was done to satisfy the requirement of 30 U.S.C.A., § 28, to-wit:

> Q Did you do drilling for the Welch Mining Company?
>
> A Yes, I did.
>
> Q Did you do drilling during 1960 and 1961?
>
> A Well, I couldn't exactly tell you the years that I done the drilling and the actual years that I was working in the mine.

(Page 98, Lines 8-12.)

> Q Calling your attention to the year 1960, did you do drilling in this area where this reservoir is in the Wayne Smith corral for Welch?
>
> A Yes, I did, as near as I can recollect.
>
> Q Do you know how much drilling you did?
>
> A No.

(Page 102, Lines 10-15.)

The Trial Court was justified in finding that the required work was not done.

Appellants assert, on page 15 of their Brief, that Exhibit 89, the recorded affidavit with reference to SAND VALLEY CLAIMS, and others, "supports the testimony of Mr. Thurston." Respondent submits that since Mr. Thurston's testimony does not show the work was done, support of that testimony adds nothing.

Further, the Trial Court found that the recorded affidavits on DESERT RAT CLAIMS and SAND VALLEY CLAIMS (Exhibits 84 and 89) do not show the following required by § 40-1-6, Utah Code Annotated, 1953, to-wit:

A. The number of days' work done.

B. The character and value of the improvements placed on the claims.

C. The number of cubic feet of earth or rock removed.

D. The actual amount paid for the labor and improvements and by whom paid.

E. That notices were posted as required by § 40-1-5, Utah Code Annotated, 1953.

and concluded that Exhibits 84 and 89 are not prima facie evidence that the work was done. (Finding of Fact No. 10 and Conclusion of Law No. 3 in Findings of Fact and Conclusions of Law dated May 18, 1979). This finding is not challenged by Appellants in their Brief. (See Upton v. Santa Rita Mining Co., supra; McKnight v. El Paso Brick Co., 16 N.M. 721, 120 Pac. 694 (1911).

Under the now familiar rule of review in Rummell v. Bailey, supra, there is no basis to reverse the finding of the Lower Court that when ATLAS CLAIMS were located, the land was open to location. (Finding of Fact No. 4 in Findings of Fact and Conclusions of Law dated May 18, 1979).

ANSWER TO APPELLANTS' POINT III--THE TRIAL COURT DID NOT ERR IN FINDING THAT THE REQUIRED ASSESSMENT WORK WAS DONE ON ATLAS CLAIMS SO AS TO PRECLUDE THE RELOCATION OF THE SAME BY APPELLANTS.

Appellants concede, on appeal, that the assessment work was done on ATLAS CLAIMS for all the critical periods except the years ending on September 1, in 1973, 1974 and 1975. (Appellants' Brief, pages 24, 25). The amount of work done during each of the questioned years was greatly in excess of $11,400.00 ($100.00 for

each of 114 claims) and Appellants admit that the amount was sufficient. (This Brief, pages 7-10; Appellants' Brief, page 46). However, Appellants contend that the actual work was not done during those critical years on the particular ATLAS CLAIMS which Appellants sought to relocate and that the work done on other ATLAS CLAIMS did not benefit, so as to qualify as assessment work, the particular claims in conflict.

Exhibit 47 shows (and Appellants do not dispute) that ATLAS CLAIMS are one contiguous group.

The statements on page 27 of Appellants' Brief that the drilling represented by green dots on Exhibit 58 extended approximately 2 miles is not accurate. The scale on Exhibit 58 is the same as on Exhibit 47, 1 inch equals 600 feet. A simple measurement on Exhibit 58 shows that each line of green dots is about 7,500 feet. Pages 28-31, 41, and 42 of Appellants' Brief list alleged distances between the work done on ATLAS CLAIMS and POWELL CLAIMS. Respondent submits that the distance between the place of the work on ATLAS CLAIMS and POWELL CLAIMS is totally irrelevant. The distance between the place where the work was done on ATLAS CLAIMS and the particular ATLAS CLAIMS which Appellants sought to relocate may have some relevance. Assuming that this is what Appellants are trying to show, Respondent submits that while precise mathematical measurement of distances is not critical to a determination of the issues, Appellants' Brief does not accurately state the distances. One example will suffice. Page 28 of Appellants' Brief asserts that the closest hole drilled by CONOCO in February and March, 1973 is one mile from the nearest of POWELL CLAIMS. Exhibit 58 and Exhibit 47 show that one of the holes is about 1,000 feet from Hihope 1 (one of ATLAS CLAIMS

sought to be relocated by Appellants). (See this Brief, page 8).

The drilling done by CONOCO for the assessment year ending September 1, 1974 was performed in October and November, 1973, prior to the location of any POWELL CLAIMS (the first of which was located in January, 1974) which Appellants now assert to be valid. (See pages 7-8 of this Brief and page 29 of Appellants' Brief). This, even if the work was not done in the prior assessment year, (and it was in fact done), the work in October and November, 1973 amounted to a resumption of the work on ATLAS CLAIMS which would preclude the relocation of the same by POWELL CLAIMS. Belk v. Meagher, 104 U.S. 279 (1881); Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70 (1888); Klopenstine v. Hays, 20 Utah 45, 57 Pac. 712 (1899); Strattan v. Raine, 45 Nev. 10, 197 Pac. 695 (1921); Herbert v. Bond, 56 S.D. 220, 228 N.W. 185 (1929); Whitwell v. Goodsell, 37 Ariz. 451, 295 Pac. 318 (1931); Hartman Gold Mining Co. v. Warning, 40 Ariz. 267, 11 P.2d 854 (1932); Pidgeon v. Lamb, 133 Cal. App. 342, 24 P.2d 206 (1933); Ickes v. Virginia Colorado Development Corporation, 295 U.S. 639, 55 S.Ct. 888, 79 L.Ed. 1627 (1934); New Mercur Mining Co. v. South Mercur Mining Co., 101 Utah 131, 128 P.2d 269 (1942), cert. denied 319 U.S. 753, 63 S.Ct. 1162, 87 L.Ed. 1707; Knight v. Flat Top Mining Co., 6 Utah 2d 51, 305 P.2d 503 (1957); Featherston v. Howse, D.Ark., 151 F. Supp. 353 (1957). Therefore, all the drilling done by CONOCO in calendar year 1973 should be considered with reference to POWELL CLAIMS located from January through May, 1974.

The question in this case goes to the sufficiency of the assessment work done on ATLAS CLAIMS for the assessment years ending September 1 in 1973, 1974 and 1975, and more particularly, whether the work done on ATLAS CLAIMS was of "benefit" (as that

term is defined in the applicable cases) to the entire group of claims and particularly to those claims which Appellants sought to relocate.

The pertinent language of 30 U.S.C.A., § 28 (which has not changed since its adoption) is as follows:

> On each claim..., and until a patent has been issued therefore, not less than $100 worth of labor shall be performed or improvements made during each year.... Where such claims are held in common, such expenditures may be made on any one claim.

See Chambers v. Harrington, 111 U.S. 353, 4 S. Ct. 428, 28 L.Ed. 452 (1884).

Justice Sawyer, in Mount Diablo M. & M. Company v. Callison, Cir. Ct., D. Nev., 5 Sawyer 439, 17 Fed. Cases, Case No. 9886 (1879), said:

> "Work done outside of the claim..., if done for the purpose and as a means of prospecting or developing the claim,... is as available as if done within the boundaries of the claim itself. One general system may be formed well adapted and intended to work several contiguous claims..., and where such is the case work in furtherance of the system is work on the claims intended to be developed.

In Smelting Co. v. Kemp, 104 U.S. 636, 26 L.Ed. 875 (1881) we read the following:

> Long before patents were allowed--indeed from the earliest period in which mining for gold and silver was pursued as a business--miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one for convenience and economy in working them. . . .
>
> Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, where the improvement consists in the construction of a flume to

carry off the debris or waste material.

In Jupiter Mining Co. v. Bodie Consolidated Mining Co., Cir. Ct., D. Cal., 11 Fed. 666, 7 Sawy. 96 (1881), the instruction given to the jury by Chief Justice Sawyer included the following:

> With regard to the work required to be done in order to hold a claim, the jury are further instructed that where one person or company owns several contiguous or adjoining claims capable or being advantageously worked together, one general system may be adopted to work such claims.... When such a system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims, or outside of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself.

In Jackson v. Roby, 109 U.S. 440, 3 S. Ct. 301, 27 L. Ed. 990 (1883), the only assessment work claimed was that of constructing a flume from the adjoining claims which carried tailings from the adjoining claims to the claim in question to the extent that the tailings covered more than one-third of the claim in question. Justice Field, who also wrote the opinion in Smelting Co. v. Kemp, supra, quoted the language cited above from that case and said:

> In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such cases the expenditures required may be made, or the labor be performed, upon any one of them. . . .
>
> Here no work was done for the general improvement of all claims. The deposit of the debris from the Lomax Gulch (the adjoining claims) on the premises in controversy, so far from tending to develop them, imposed obstacles in the way of their development, by covering them up with refuse matter.

This brings us to the leading case of Harrington v. Chambers, 3 Utah 94, 1 Pac. 362 (1882), in which the trial court adopted findings of the referee that work on a main shaft on one claim "with a view to the future working and development" of two additional claims had a tendency to develop all three claims and was

proper assessment work.

The Supreme Court of the Territory of Utah affirmed the decision and said, in part, as follows:

> The second point urged upon our attention relates to that portion of the fifth finding of fact, which states that the main shaft of the Lady of the Lake is in such proximity to said Parley's Park mining claim, that work in it has a tendency to develop said claim. It is claimed by the appellants that there is no evidence to support this part of the finding. The testimony uncontradicted established as a fact, as stated in the finding, that the owners of the Parley's Park claim were also the owners of two certain claims, called respectively the "Central" and "Lady of the Lake," the Central adjoining the Parley's Park, and the Lady of the Lake adjoining the Central mining claim, and with a view to the future working and development of all three of said claims, the owners thereof located what is called the "main shaft" in the Lady of the Lake surface ground. The testimony was also uncontradicted as to the object for which the shaft was located, and its relative location; it was further shown upon the maps put in evidence. It is true, no witness testified in the exact words of the finding objected to, nor was this necessary in order to support the finding. The portion of the finding objected to is a statement of the ultimate facts found by the referee from this uncontradicted testimony, and is warranted by the facts and circumstances in proof. . . .
>
> The testimony in the case before us leaves no room for doubt, and such is the express finding of the referee that the work in question was done for the express purpose of developing the three claims owned by the respondents, one of which is the Parley's Park, and...is as available for holding that claim as if done on the claim itself.

This case was appealed to the United States Supreme Court (Chambers v. Harrington, supra) which affirmed, quoting with approval the above language from Mount Diablo M. & M. Company v. Callison, supra, and Jackson v. Roby, supra. The Court also said:

> It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefitted by the work done on one of them.

Book v. Justice Min. Co., Cir. Ct., D. Nev., 58 Fed. 106 (1893), involved work done on one tunnel commenced outside of three adjoining claims and on another commenced on one of the

claims. The court held these to be sufficient and said:

> When such work is done for the avowed and express purpose of prospecting two or more claims held in common, as was the case here, the courts have always held that such work was to be credited to such claims. This is always deemed to be a sufficient compliance with the provisions of the mining laws of the United States.

It is well to briefly summarize the development of the law from the above cases (that is, up to and including Book v. Justice Min. Co., supra, in 1893).

The proposition that work done on one claim can serve as work on another was well established. Mount Diablo M. & M. Company v. Callison, supra (1879); Smelting Co. v. Kemp, supra (1881); Jupiter Mining Co. v. Bodie Consolidated Mining Co., supra (1881); Jackson v. Roby, supra (1883); Chambers v. Harrington, supra (1884); Book v. Justice Min. Co., supra (1893). The 1872 Mining Law and these cases were a statutory and judicial confirmation of a practice existing among miners prior to the adoption of the 1872 Mining Law. Smelting Co. v. Kemp, supra; Chambers v. Harrington, supra.

The opinion of the Supreme Court of the Territory of Utah in Harrington v. Chambers, supra, affirmed a finding that the work had "a tendency to develop" the adjoining claim and held that the requirement is met if the work is done for the "express purpose of developing" all the claims in the group and also held that such might be inferred. The United States Supreme Court in Chambers v. Harrington, supra, in affirming the Utah decision, stated that "the claims must be contiguous, so that each . . . may in some way be benefited . . . ." and reaffirmed the statements in the earlier cases to the effect that "the law permits a general system to be adopted for adjoining claims."

We now move to an examination of subsequent cases. Wilson v. Triumph Consolidated Mining Co., supra, speaks in terms of "consolidation" of adjoining claims for "development and working purposes", and Klopenstine v. Hays, supra, holds the work on one claim sufficient to hold other claims without explanation. Fissure Co. v. Old Susan Co., 22 Utah 438, 63 Pac. 587 (1900), incorporates some of the language of the earlier cases stating that "the claims were consolidated or worked for development purposes", that the "work was done to apply on" all the claims, and that the "work was of benefit to all claims."

This Court came squarely to grips with the issue of how work on one claim had to relate to adjoining claims in order to meet the requirements of the statute in Nevada Exploration and Mining Co. v. Spriggs, 41 Utah 171, 124 Pac. 770 (1912). In that case, the trial court found the work sufficient. The crucial facts, as stated in the dissent of Justice Straup, are as follows:

> Respondents claimed 7 or 8 claims. They did work on one which they claim inured to and was for the benefit of all. The work done by them on the one claim was the sinking of a shaft about 122 feet deep, one or two short drifts, and the running of a tunnel 114 feet long. This work, most of which was done after appellant's location, is claimed inured to the benefit of the 6 or 7 other claims, tended to develop them and to discover mineral therein, and facilitated the extraction of ore therefrom. It is shown that to extend the tunnel to such claims and to the area in conflict would require the tunnel to be extended a distance of from 3,700 to 4,500 feet and that, when the tunnel is so extended, a depth on such claims of only 54 feet would be attained. While so-called experts testified that in their opinion the work inured to the benefit and to development of such claims, yet, when asked on what facts such opinions were based, their answers, in my judgment, disclosed none. It is not shown that the vein on the claim on which the work was done is the same vein on the claims alleged to be benefited by such work. I think what evidence there is on the subject shows the contrary. It is almost inconceivable that a tunnel 3,700 or 4,500 feet through solid rock will be or ever was intended to be extended to such claims to reach depth of only 54 feet. It is not made to appear how the sinking of the shaft on the

one claim tended to discover or explore mineral on the other claims 3,000 to 4,000 feet away, or facilitated its extraction therefrom. The physical features and relative positions of gulches and mountains render that impractical, if not impossible.

In spite of this, the majority of this Court affirmed, saying:

> The next proposition argued is that the court erred in finding that respondents had done the requisite amount of assessment work and had made the necessary amount of improvements to entitle them to a patent for the mining claims in dispute. It is contended that the evidence is insufficient to sustain such findings. The principal objection in this regard is that the work, which consisted of sinking a shaft and running drifts therefrom, was not calculated either to prospect or to develop the entire group of mining claims, or any considerable part thereof, because the shaft in question was too far distant from some of the claims, and because the drift, even if run from the shaft, would not reach an appreciable depth below the surface because the elevation of the claims was not much above the elevation of the shaft. There is some direct and positive evidence from expert miners and mining engineers in the record that the shaft and the drifts as constructed tended to develop the whole group of claims, and that the work was also proper as prospecting work. We think the trial court was right in not substituting his own judgment for that of the mining men and engineers. The courts should be very slow, indeed, in holding that certain work is not calculated to develop certain mining claims, or is not proper prospecting work, when there is competent evidence that such is the effect of the work in question, and where there is no evidence to the contrary.

The Court then cited Chambers v. Harrington, supra, and said further:

> But counsel insists that there is no proof that respondents had in fact adopted a general system, or any system, for the development of their claims. We think that it is not necessary for a claimant to prepare plans and specifications with regard to how he intends to develop his claims. The purpose of the law is to require claimants to do such work or to make such improvements as may be said are calculated to prospect the claims, or that will develop the mineral in the claims, or will facilitate the extraction of the mineral found therein. In many instances, if a fixed plan were adopted in advance of exploration, it, for obvious reasons, would have to be departed from before pursuing it many days, and in all cases where veins were found, the strike of which was in a direction different from that in which they were assumed to be, the entire plan would necessarily have to be

changed. We think that what is intended by the use of the term "system" or "general system" of work means simply this: That the work, as it is commenced on the ground, is such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be in the claims, or, if these are known, that the work will facilitate the extraction of the ores and mineral.

In Love v. Mt. Oddie United Mines Co., 43 Nev. 61, 184 Pac. 921 (1919) the assessment work for eight claims was done on a shaft on one claim. There was conflicting evidence as to whether or not the work benefitted the entire group. The jury and trial court rendered a verdict and judgment for the relocator. The trial court gave an instruction to the jury "that where work is done upon one claim for the benefit of the entire group, it 'must manifestly tend' to the development of all the claims in the group." The Supreme Court of Nevada held that this instruction was in error, that there was not evidence to sustain the judgment, and reversed the trial court.

The following excerpts from the court's opinion are helpful here, to-wit:

> The trial judge, in his written decision, cited Section 630 of Lindley on Mines in support of his views. He no doubt accepted the statement of Mr. Lindley without having examined the authorities cited by that eminent author in support of the text, as was most natural, in view of the arduous labors incident to his position; and, while we entertain great deference for the views of Mr. Lindley, we cannot accept his statement of the law. We have examined the decisions of the various courts cited and do not find that they support the author; nor do we see how such a view can be sustained. The word "manifest" means "evident to the senses; evident to the mind; obvious to the mind." Webster's Int. Dict. The courts uniformly hold that annual labor may be done outside of a claim, or group of claims, upon a patented mining claim, or upon the public domain. Certainly work done outside of a claim, upon a patented mining claim, or upon the public domain, cannot be said to "manifestly" tend to develop such claims; but it is the universal rule that proof may be offered to show that such work was done for the purpose of developing such other claims, and that in fact it tends to develop them, and when so shown it complies with all requirements. [and] were the rule that the work

"must manifestly" tend to develop a group of claims, work done on the public domain could not count, as by no possible stretch of the imagination, could it be said that such work would "manifestly" tend to develop such group, nor could proof cause it to "manifestly" so appear. The correct rule to apply to the situation here presented is declared by the Supreme Court of the United States in Smelting Co. v. Kemp, 104 U.S. 636, 26 L. Ed. 875....

It may be said that it is the policy of the law to encourage the doing of annual labor on mining claims in a manner which will best develop the property and lead to the discovery of mineral, and for that reason annual labor upon a group of mining claims may be done all in one place, the object of the government being to encourage such development as is most likely to result in the production of the precious minerals; and since depth is usually necessary in the making of a mine, it is much better, as a general rule, to spend $800 in one place than to distribute $800 in eight or more places, provided it is done in an honest effort to make a mine, and in a manner tending to develop all of the claims. And in the exercise of judgment as to where work should be done, we think a wide latitud should be allowed the owners of property, consisting of several claims, as to where the work shall be done to develop a group of claims. And in this view we are sustained by ample authority. In Big Three M & M Co. v. Hamilton, supra, (157 Cal. 130, 107 Pac. 304, 137 Am. St. Rep. 118 (1909)), it was said:

"Work done on one of a group of mining claims which has a tendency to develop or benefit all of the claims in said group inures to the benefit of each and all of said claims, even though the system adopted may not be the best that could have been devised under the circumstances."

Judge Farrington, in Wailes v. Davies (C.C.) 158 Fed. 667, in determining a case in which the question before us was involved said:

"The statute does not require * * * that the work shall be wisely and judiciously done."

Miehlich v. Tintic Standard Mining Co., 60 Utah 569, 211 Pac. 686 (1922), with some similarities to Love v. Mt. Oddie United Mines Co., supra, was a logical extension of Nevada Exploration and Mining Co. v. Spriggs, supra, and further clarified what this Court said in the earlier cases. A large number of claims were involved. There were two factors in this case which were not present in Nevada Exploration. First, there was sharply

conflicting evidence as to whether the work in question tended to develop the distant claim. Second, the trial court found that the work did not develop the distant (2,000 feet) claim (Greyhound No. 5). Now this Court had to decide what it meant in Nevada Exploration in saying that it would not substitute its judgment for that of the miner.

The Court confirmed the language in Nevada Exploration and extended it to its logical conclusion by reversing the trial court on the grounds that the Court would not substitute its judgment for that of the miner, since there was evidence in the record to support the contention that the work did tend to develop the distant claim, even though sharply disputed by other evidence and even though the trial court chose to believe the contrary evidence.

The following excerpts from the opinion of the Court are particularly pertinent here, to-wit:

> As opposed to the defendant's testimony bearing upon the question whether the work done tended to develop the Greyhound No. 5 is the testimony of the expert witness R. H. Strickland, who gave it as his opinion that it did not tend to develop the Greyhound No. 5. He gave it as his opinion that there was some faulting between where ores had actually been found in the workings of the Standard Mine and the Greyhound No. 5, and geological conditions generally showed that the work done on the group did not support the defendant's contention that the work done tended to develop the Greyhound No. 5. In the light of what has been actually demonstrated in the extensive mine workings on the defendant's group of claims, it would seem the opinions of expert geologists ought not be particularly persuasive in arriving at the fact to be determined. The evidence shows and the trial court found, that during some years since the location of the Greyhound No. 5 the drifts projected from the shafts on the defendant's group of claims were in a northwesterly direction, and away from the Greyhound No. 5. The trial court in making that finding or arriving at that conclusion seems to have lost sight of the fact that during those years the work, nevertheless, was actually done upon and within the confines of the defendant's group of claims; that all of the claims are in a mineralized country, and within the same mineral zone;

> that the most economical and practical way to develop their mineral resources was the sinking of shafts to attain depth and then run drifts in any direction in which there would be a likelihood of finding ore, not necessarily in the direction of every claim composing the group, but in any way that experience and good judgment of a practical miner would dictate in order to intercept ore veins or ore channels and attain a knowledge of underground conditions, and where deposits of ore are likely to be found. The mere fact that drifts are not projected from a shaft toward a particular claim some one year is no indication that ore channels, when found in some other claim, will not in course of time be followed or that they will not lead into that claim. The very purpose of the government in granting mineral rights to the citizen is to have the mineral resources of the country developed. The statutes do not attempt to prescribe the manner in which work shall be done upon a mining claim in order to protect theminer's rights. If the labor tends to develop the mineral resources of the claim, that satisfies the law. Moreover, the courts will never substitute their judgment for that of the practical miner acting in good faith while expending his money and labor for the development of a group of mining claims as has the trial court in this instance.

Thus, the law in Utah has developed so that the test is one of good faith, and the work is sufficient if there is competent evidence of benefit, even though an expert witness may appear at trial and express his opinion that the work was not of any benefit to a particular claim or group of claims in the group. This is also the rule in other jurisdictions. See for example, Great Eastern Mines, Inc. v. Metals Corp., 86 N.M. 717, 527 P.2d 112 (1974).

Appellants do not specifically challenge the good faith of Respondent and its predecessors in connection with the assessment work in question except with an oblique reference to the effect of inflation and the energy crisis on the assessment work requirement. (Appellants' Brief, page 17). Appellants, admit that the required amounts (and much more) of work were done. (Appellants' Brief, pages 26, 30, 46; this Brief, pages 7-9, 24, 25).

The good faith of Respondent and its predecessor cannot be

successfully questioned. ATLAS CLAIMS have been consolidated into one group or unit for purposes of exploring, developing, working and operating the same and doing the assessment work thereon extending back as far as 1945, when the first of ATLAS CLAIMS were located--a period in excess of thirty years. The entire record in this case and particularly the work done as shown by Defendant's Exhibits 71, 94, 95 and 96 show that a tremendous amount of work has been done over wide-spread areas of this property and that there was "bona fide intention to develop the land and use the mineral resources" so as to meet the definition of good faith in Chamberlain v. Montgomery, 1 Utah 2d 31, 261 P.2d 942 (1953). Mr. Dearth testified that ATLAS has invested much money in the area. (Transcript of March 23, 1978, pages 71, 72.) Extensive mining and drilling operations have been conducted by ATLAS on ATLAS CLAIMS (Exhibits 59-68, 71, 73-75, 80, 92-93).

That the "good faith" test was used by this Court in its subsequent decisions is indicated by Utah Standard Mining Co. v. Tintic Indian Chief Mining and Milling Co., 73 Utah 456, 274 Pac. 950 (1929), in which defendant's 22 claims were located prior to plaintiff's ten claims. At least $930.00 in assessment work (consisting of the extension of a tunnel on one claim and building a road to the group of claims) was done during the critical assessment year on defendant's claims. The trial court found that the assessment work had not been done. This Court reversed and remanded for a new trial on the grounds that "the defendant performed enough work to do the annual labor on nine claims out of the 13 involved in the conflict area." It seems clear that had the amount of work been sufficient, the court would have had no hesitancy in applying it to the entire group of claims.

In New Mercur Mining Co. v. South Mercur Mining Co., supra, discussed on pages 21, 22 and 33 of Appellants' Brief, plaintiff owned 12 claims leased to Snyder Mines Inc. for which the assessment work in question was done by "leasers" under Snyder in a tunnel on adjoining property owned by another party and also leased by Snyder. The trial court held the assessment work was sufficient and the Utah Supreme Court affirmed. The Court expressly followed the principles laid down in Chambers v. Harrington, supra; Klopenstine v. Hays, supra; Wilson v. Triumph Consolidated Mining Co., supra; Nevada Exploration and Mining Co. v. Spriggs, supra; and Fissure Co. v. Old Susan Co., supra.

Because the work was done, not on one contiguous group of claims as in the case at hand, but on another group of claims in which the owner of the contested claims had no interest, the issue with which this Court was most concerned in New Mercur was the question of the "community of interest." The Court was endeavoring to set some standards as to when work done on one group of claims with one ownership would qualify as assessment work on another group of claims with different ownership. The statements in the opinion about "burden of proof", "plans", "systems" and "intent" must be viewed in that light. That this is a valid distinction is suggested in Simmons v. Muir, 75 Wyo. 44, 291 P.2d 810 (1955).

Although the facts of New Mercur are distinguishable from this case, a careful reading of the opinion, with particular attention to the evidence from which the Court found a "system", "plan", and "intent", and the Court's approval of the rules in the earlier cases (which are directly in point here) leads to the conclusion that New Mercur strongly supports Respondent's

position.

Appellants, on page 24 of their Brief, state their version of the law as follows:

> ...(T)he burden is on the owner to clearly show that the work in question, prior to its performance, was intended, under a general plan or scheme, as the assessment work upon each claim and that the work manifestly tended to benefit each of the claims.

The foregoing is not an accurate statement of the law in Utah under the cases discussed on pages 27-38 of this Brief.

Respondent is unable to find any authority in Appellants' Brief for the proposition that the owner has the burden to "clearly show" that the work meets the requirements. The Utah cases do not contain this language, but rather uphold testimony which "tends to show", and also hold that the Court will not substitute its judgment for that of the miner acting in good faith and that it will indulge in every reasonable presumption in favor of upholding the validity of the work. Wilson v. Triumph Consolidated Mining Co., supra; Fissure Co. v. Old Susan Co., supra; Nevada Exploration and Mining Co. v. Spriggs, supra; Miehlich v. Tintic Standard Mining Co., supra. See also Simmons v. Muir, supra. This latter approach was most recently demonstrated by this Court in Albrecht v. Uranium Services, Inc., Case No. 15996, 596 P.2d 1025 (1979).

Further, the requirement of a "prior general plan or scheme" was expressly rejected in Nevada Exploration and Mining Co. v. Spriggs, supra, which holding was reaffirmed in New Mercur Mining Co. v. South Mercur Mining Co., supra.

Parker v. Belle Fourche Bentonite Products Company, 64 Wyo. 269, 189 P.2d 882 (1948) is cited by Appellants in support of their contention that the work must "manifestly tend" to develop

all the claims. Simmons v. Muir, supra, shows the tendency of the Wyoming Court to limit the holding of Parker. In any event, the Utah cases of Chambers v. Harrington, supra; Nevada Exploration and Mining Co. v. Spriggs, supra; Miehlich v. Tintic Standard Mining Co., supra, and New Mercur Mining Co. v. South Mercur Mining Co., supra, do not use the word "manifestly" but rather hold that the test is whether the work "tends to develop." The use of the latter standard and the facts and holdings of the Utah cases indicate that this Court, like the Nevada Court in Love v. Mt. Oddie United Mines, supra, has rejected the language used in Parker.

The work must be intended to benefit the entire group, but this is shown here by the assessment affidavits in Exhibit 77 which state that the work done on ATLAS CLAIMS as a "contiguous group . . . under common leasehold or ownership" was claimed as assessment work and from the fact that the work actually benefitted all the claims.

The real issue is whether, under the standard used in the Utah cases, there is sufficient evidence to sustain the finding of the Trial Court that the work in question did benefit each of ATLAS CLAIMS.

Appellants concede that for the assessment year ending September 1, 1975, mining was done within 1,500 feet of Hihope 7 and 8 which were the only claims Appellants sought to relocate (with Yellow Sand 13) for that period; that under their interpretation, "benefit" from mining extended 1,500 to 2,000 feet; but contend that the mining was not headed toward the conflict area and therefore was of no benefit. (Appellants' Brief, pages 35, 42, 46, 47; this Brief, page 10). The mining was done on Katy 1

and Johnny Boy 1 in Mine No. 11 as shown on Exhibit 71. (See page 9 of this Brief). Appellants do not give any reference to the transcript or exhibits in support of their contention that the workings of the mine run in the opposite direction. Even if Appellants' assumption as to direction is correct, their contention was made and expressly rejected in Miehlich v. Tintic Standard Mining Co., supra. New Mercur Mining Co. v. South Mercur Mining Co., supra, did not involve that issue because the tunnel on the property adjacent to the contiguous group in question was headed toward the latter claims.

Appellants admit that Albert E. Dearth, whose qualifications they do not question, testified that the work in question did benefit the claims in question, but they attack that testimony on several grounds. (See Appellants Brief, pages 32, 43, 46, 45; this Brief, pages 9-10).

Appellants complain that Mr. Dearth was an "interested party" and emphasize the "independence" of their experts. (Appellants Brief, pages 32, 36, 44, 45). This argument goes to the credibility of the witness. Appellants do not claim Mr. Dearth's testimony was inadmissable. Credibility was for the trier of the facts to determine. Cranford v. Gibbs, supra. Judge Harding might well have seen fit to accept the testimony of Mr. Dearth because he had been involved in a direct way in a geologic evaluation of the area where ATLAS CLAIMS are situated from April, 1962 to the present, as against Appellants' witnesses, Mr. Davis, who made only limited visits to the property and Mr. Million, who had not had any contact with the area since 1956, and neither of whom had ever had any direct involvement with and/or responsibility for development or mining operations in the

area. (Transcript of March 23, 1978, pages 69, 73, 144-146, 160-162; Transcript of March 24, 1979, pages 6, 23, 25-27). Judge Harding might also have felt what was expressed by this Court in Miehlich v. Tintic Standard Mining Co., supra, as set forth on page 36 of this Brief, to the effect that in "the light of...extensive mine workings...the opinion of expert geologists ought not to be particularly persuasive...." Further, Judge Harding probably recognized that while there were differences among the geologists who testified, the fundamental difference (as is demonstrated on pages 44-48 of this Brief) was in the definition given the word "benefit" rather than on the facts and the conclusions to be drawn from those facts.

Appellants complain because Mr. Dearth testified in "retrospect" and "after the fact" and did not tell of the "existence of any type of prior plan, interest or scheme." (Appellants' Brief, pages 32-34, 47). Mr. Dearth's testimony in this regard was very much like that of Mr. Young and Mr. Marshall, the witnesses relied upon by this Court to sustain the work in New Mercur Mining Co. v. South Mercur Mining Co., supra. The actual work in New Mercur which was held to qualify as assessment work was done by parties having no legal relationship to the owner of the claims, who acted on their own initiative in following the ore in the tunnel on adjacent property. This Court expressly found that there was no evidence to show that they did the work under any direction from the owner of the claims or from any one having a legal relationship with the owner, so that the specific work could not have been done pursuant to a "prior plan" and the testimony about the value of the work in terms of the benefit to the claims in question was "in retrospect" or "after the fact."

It has heretofore been demonstrated that Utah law does not require a prior plan, scheme, or system, but rather that what is required "is that the work, if continued will lead to a discovery and development of the . . . ore bodies that are supposed to exist in the claims." Nevada Exploration and Mining Company v. Spriggs, supra; this Brief, pages 32, 33. Mr. Dearth's testimony quoted on page 46 of this Brief, to the effect that the information developed from the assessment work in question has been and will be used to further explore and develop all of ATLAS CLAIMS, shows that the work meets this requirement.

Further, the following testimony (which Appellants do not attack) of Ray Kozusko, the geologist directly involved with the CONOCO drilling in 1973 (for two of the critical assessment periods), to-wit:

> Q (By Mr. Anderson) After this project was completed in October and November of 1973 in which you were personally involved as you have indicated, did you evaluate the results of that project, of that particular drilling project, as well as all of the previous work that had been done; or that is, the information on the previous work (that) had (not) been done? (Word "that" should be added and word "not" deleted.)
>
> A Yes.
>
> Q And taking all of this information into consideration, would you describe to the Court how the drilling done in October and November of 1973 contributed to a geologic evaluation of this entire group of claims; that is, the claims that are involved in this lawsuit?
>
> A Can I round that out and add all the drilling in there as well as my February and March drilling?
>
> Q Yes, if you would.
>
> A It will be one complete picture. Well, it was designated in these gamma logs that we just looked at. Certain information can be gathered from the log itself, and together with the information that comes from the drill cuttings, as that drill hole is drilled, one can correlate geologic characteristics from the drill cuttings back to this gamma log and begin to build

> a physical picture in section or map view as to the geologic environment in a given area. In this case, we're talking about this claim group.
>
> (Witness indicating.) Now, there are various types of geologic environments which have been attributed to the formation of uranium ore deposits; and as one looks at all of this data, he begins to pull it together and build a train of thought or a possible model of genesis as it pertains to these ore deposits. And by studying one particular area and seeing other information from other sources around that particular area, one can come in here and take the detailed information of the small area and apply it to the whole region; and in this case, it was quite successful. And that's basically it in a nutshell.

(Transcript of March 22, 1978, pages 37, 38).

shows that CONOCO had a plan and that it was successful.

Appellants assert that Mr. Dearth did not specifically state how the work benefitted the entire group of claims and quote Mr. Davis and Mr. Million at length to show that there was not any benefit. A careful study of the testimony of Mr. Davis and Mr. Million shows that their opinions that the work done by ATLAS and CONOCO did not benefit all ATLAS CLAIMS is based upon the assumption that in order for the work to be of "benefit" it must indicate the presence of ore on all claims in the group. That is, it was their view that unless the drilling or mining on one claim is sufficiently close to another claim that the "pod" of ore that may be found on the first claim can be reasonably determined to extend to that adjoining claim, there is no benefit.

Mr. Dearth, in the Transcript of March 23, 1978, at pages 69-72, in response to a question as to how the work benefitted ATLAS CLAIMS and contributed to the development and/or extraction of uranium ores therefrom, explained the geologic history of the area and then testified:

> We are able to demonstrate that Atlas Corporation and its predecessors, Texas Inc. (Zinc) Minerals

has had the area under serious geologic evaluation since early 1962. Our exploration files contains hundreds of drill holes whereby we can gather the geologic information to demonstrate the trend of these sands, their thickness, and other geologic criteria....

Now that we've established the streams and the sediments that were deposited from the, in order to understand the geology and the deposition of the uranium deposits, we have to go to that period in geologic time when the ore-bearing solutions were introduced to the sandstones. There is a technique whereby physicists can take a specimen of ore and date the rock that contains that specimen by radioactive decay. That process has established that most of the uranium deposits on the Colorado plateau are approximately sixty million years old. When these ore-nearing solutions were introduced to the sandstones -- and this sandstone is common(ly) referred to as the host sandstone, because it houses or forms a depository for the ore deposits -- the solutions responded to chemical and physical conditions that allowed the deposits to be formed in clusters that range from 1,000 tons up to 50,000 tons. In addition to depositing (precipitating) out as ore bodies, these solutions also left evidence of having transgressed through the rocks. This evidence is manifested in bleaching of the sandstone from red to grey or green; decay of carbonaceous materials, which was (were) the trees which grew along the streams; color of the sandstone; and other geologic criteria that we've been able to collect from underground observations and drill holes.

Now, as we gather this information -- and I would like to refer to the testimony of Mr. Black and the cross-examination by Mr. Frandsen when he asked detailed questions about the information we gained from the drill holes -- you will recall that Mr. Frandsen picked some logs that showed ore grade material. Naturally, we are pleased when we drill a hole to find ore in it; and I would like to also mention at this time the opportunity to explain to Your Honor that these are the kinds of information that we get from the drill holes which is an answer to a question you asked several days ago. Not only is the mineralization recorded there, but the lithologic logs referred to during their cross-examination contains the information about the sand, which is helpful in making a judgment as to when (where) the next hole should be drilled. Mr. Frandsen pointed out that several of the drill logs contained no ore, and he correctly referred to them as dry holes, using oil terminology. I would like to say that that piece of information is important to the expiration (exploration) geologist also, because it indicates to him that he is off-trend; that he has chosen a location not compatible with the depositional trend of the ore bodies. Therefore, he must re-evaluate where he will place his next hold (hole). His object is to find the trace or the pattern that leads from one pod to another. And I

> want my testimony to be recorded to say that all of these criterion can be included throughout the district to find additional ore deposits. I would further state that since 1962 the accumulation of data, geologic data, that we have in our files has given me the confidence to recommend to our management to sink the Snow shaft which has been referred to in previous testimony as well as (the) current . . . shaft we are sinking at a cost of a million and a half dollars. I'm confident that these geologic guidelines that we gather from the assessment work that was performed in the years you have recited to me have been, can be, and will assist us in finding ore deposits throughout this district.

The testimony of Mr. Dearth and Mr. Kozusko quoted above and that summarized on pages 8-10 of this Brief, show how the work done by CONOCO and Respondent during the critical periods did tend to develop all the claims and was proper prospecting work; that there are "trends" of ore across the property even though commercial ore may not have been blocked out in every corner of the property; and that a knowledge of these trends, which contributes significantly to further development, is enhanced by the work done. There is also much in the testimony of Mr. Davis and Mr. Million not cited by Appellants which supports the above. Mr. Davis testified of "general trends", indications from such things as "sedimentation", "structure", and "structural geologic stratigraphy" (which "may give you a clue") and that there are "stringers" which may lead from one ore deposit to another. (Transcript of March 23, 1978, pages 141-159, 163.) Mr. Million acknowledged that there is a general trend or strike of ore through the area, that the way the ore is deposited is uniform, and that he would not recommend that the property be abandoned if his described development program did not reveal the existence of ore. (Transcript of March 24, 1978, pages 27-29).

Appellants' interpretation of the term "benefit" and its underlying assumption that the validity of assessment work is

dependent upon the finding of ore on a particular claim is inconsistent with the Utah cases discussed above, none of which require that in order for work on one claim to serve as work on another it must show the existence of ore. On the contrary, the validity of the work was sustained even though it could not possibly have served that purpose. Nevada Exploration and Mining Co. v. Spriggs, supra, and Miehlich v. Tintic Standard Mining Co., supra, are the best examples of this. There is express language in Miehlich that attaining "a knowledge of underground conditions" is a benefit, which supports the Respondent's interpretation of benefit.

Respondent submits that Appellants are confusing principles dealing with a "calculation of ore reserves" with principles dealing with assessment work where the standard is entirely different. It is also worthy of note that Appellants' complaint that Mr. Dearth did not give specific facts to support his opinion of benefit was raised by Justice Straup in his dissent and was rejected by the majority of this Court in Nevada Exploration and Mining Co. v. Spriggs, supra.

Appellants further complain because Mr. Dearth did not give "limitations or guidelines regarding the area benefitted." (Appellants' Brief, pages 32, 42, 43). It is a sufficient answer to this that Mr. Dearth testified as to ATLAS CLAIMS, the only property involved in the case, and neither he nor the courts involved need make any determination beyond that.

Respondent strongly disputes the characterization of the testimony of Mr. Dearth that the drilling done was "a hit and miss type of activity" and contends that the evidence shows that the work was done on a very systematic and scientific basis.

(See the entire testimony of Raymond Sinkbeil, Ray Kozusko, James D. Black and Albert C. Dearth in Transcript of March 21, 1978, pages 141-147; Transcript of March 22, 1978, pages 2-42; Transcript of March 23, 1978, pages 37-52; Transcript of March 24, 1978, pages 36-39; Transcript of April 26, 1978, pages 75-77).

In Pinkerton v. Moore, 66 N.M. 11, 340 P.2d 844 (1959), cited on page 22 of Appellants' Brief, the work which was rejected by the court was reconnaissance surveys (probably done with a geiger counter or similar instrument) which the court characterized as "geophysical" or geological" work. The holding was restricted in its application by the subsequent New Mexico case of Great Eastern Mines, Inc. v. Metals Corp., supra. Further, since the instant case does not involve geophysical or geological work, Pinkerton has no application here.

Parker v. Belle Fourche Bentonite Products Company, supra, discussed on pages 22, 23 and 36 of Appellants' Brief, is distinguishable from the present case on two counts: First, in that case there was a finding of the trial court that the work did not benefit the claims in question, (See Simmons v. Muir, supra.) and, second, that in the case at hand there are ore trends through the entire property about which the work in question gave information. Even if Parker were not distinquishable, the decisions of this Court, heretofore discussed, are to the contrary and deal precisely with the issues here presented.

What has been said above is a sufficient answer to the contention on page 47 of Appellants' Brief that Chambers v. Harrington, supra, places the burden on Respondent to show that the work benefits each claim by facilitating the extraction of minerals from each of the claims." That is not the test in

Chambers nor in any of the other Utah cases.

Finally, once again, the issue is one of fact. Love v. Mt. Oddie Mines Co., supra; Simmons v. Muir, supra. The Trial Judge found that the work did benefit each of ATLAS CLAIMS and that the assessment work was done. (This Brief, page 10). Under the rule of review in Rummell v. Bailey, supra, "taking all of the evidence and every inference and intendment fairly arising therefrom...in the light most favorable" to the findings of the Trial Court, the evidence supports these findings. As in Nevada Exploration and Mining Co. v. Spriggs, supra, and New Mercur Mining Co. v. South Mercur Mining Co. supra, the findings are "not clearly against the preponderance of the evidence" and should not be disturbed.

SUMMARY

The issues before the Court are essentially factual. The Trial Judge determined all the issues in favor of Respondent and against Appellants and decided that:

I. ATLAS CLAIMS are valid, that they have not been moved and their location on the ground and dimensions are as shown on Exhibits 41, 42 and 43.

II. At the time HIHOPE CLAIMS (part of ATLAS CLAIMS) were located in February, 1961, the land covered by those claims was open to location and DESERT RAT CLAIMS and SAND VALLEY CLAIMS were:

A. Not validly located; and

B. If they were, the annual assessment work was not done for the critical periods so that those claims were subject to relocation in February, 1961.

III. The assessment work was done on ATLAS CLAIMS for the

periods critical to POWELL CLAIMS so that the land covered by POWELL CLAIMS was not open to location when POWELL CLAIMS were located.

Under the applicable law the evidence supports the decision of the Trial Court in favor of Respondent and the same should be affirmed.

DATED this 6th day of September, 1979.

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of September, 1979, I mailed three (3) copies of the foregoing Respondent's Brief, postage prepaid, addressed to Attorneys for Appellants as follows:

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